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(2)

In the Supreme Court of the United States

OCTOBER TERM, 1994

BERTRAM ANDREWS-POWLEY, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Judge Advocate General's role in preparing fitness reports for military officers who serve as judges on the courts of military review undermines the independence of those judges and renders petitioner's convictions invalid under the Due Process Clause.

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OPINIONS BELOW

The decision of the Court of Military Appeals (Pet. App. 1a) and the decision of the Navy-Marine Corps Court of Military Review (Pet. App. 2a-3a) are unreported.

JURISDICTION

The decision of the Court of Military Appeals was issued on July 7, 1994. The petition for a writ of certiorari was filed on October 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993).

STATEMENT

The Judge Advocate General of the Navy is the principal legal officer for that military service. He assigns other commissioned officers to serve as judges of the Navy-Marine Corps Court of Military Review. In accordance with Department of the Navy regulations, he also submits fitness or efficiency reports respecting those officers. Navy regulations require preparation of fitness reports for all of the Navy's commissioned officers. The reports describe an officer's performance and conduct during the reporting period and form a basis for determining his retention, promotion, and future assignments. A typical report consists of a checklist evaluation in several key areas of performance, a narrative summary of the officer's accomplishments during the reporting period, and a comparative ranking with other officers of the same pay grade in the same organization.

Petitioner, a convicted service member, contends that the Judge Advocate General's role in preparing fitness reports for military officers who serve as judges on the courts of military review undermines the independence of those judges and renders petitioners' convictions invalid under the Due Process Clause. The United States Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) rejected that challenge on the basis of its previous decision in *United States* v. *Mitchell*, 39 M.J. 131, cert. denied, 15 S. Ct. 200 (1994) (No. 94-174), which specifically addressed the question.

ARGUMENT

Petitioner urges this Court to review the Court of Military Appeals' decision rejecting his challenge to the Judge Advocate General's role in preparing fitness

reports for military judges. He adopts and incorporates the arguments set forth in the petition for a writ of certiorari in *United States* v. *Mitchell*, *supra*. See Pet. 3. As we explained in our brief in opposition in *Mitchell*, the Court of Military Appeals correctly concluded that the Judge Advocate General's role in preparing fitness reports for military officers who serve as judges on the courts of military review does not offend due process.* The Court of Military Appeals' ruling in *Mitchell* is consistent with this Court's recent decision in *Weiss* v. *United States*, 114 S. Ct. 752 (1994), does not conflict with any decision of this Court or another court of appeals, and does not otherwise warrant review. The decision in this case simply follows the Court of Military Appeals' decision in *Mitchell* and does not provide any additional basis for this Court's examination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* We are providing counsel in this case with a copy of our brief in opposition in *Mitchell*.